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## THE BECKER CASE AS SUGGESTING CERTAIN REFORMS IN CRIMINAL PROCEDURE.

"At about 2 o'clock in the morning of July 16, 1912, in one of the most public portions of the City of New York at such an hour, one Herman Rosenthal was shot to death in the street."

Thus opens and continues in true melodramatic style the opinion of Judge Hiscock of the New York Court of Appeals justifying the decree of the majority of the court in reversing the judgment of the lower court in the case of People v. Becker, 104 N. E. Rep. 396.

The opinion is noteworthy by reason of the ill concealed feeling of friendliness manifested for the defendant and the special pleading which the court puts forth in his behalf. It reads more like an advocate's fervid plea for the defense than a court's cold, calm decision on the law.

In fact there are no important declarations of law to be found in the decision. The court seems to be sitting rather as a jury than as a court of appeals. In the very beginning of its argument it makes this astounding statement: "Absolutely no testimony was given on the trial directly tending to connect the defendant with the murder by other than six witnesses." Six witnesses! Surely sufficient testimony to give a jury some right to hang a verdict on even if every witness is vulnerable as to his character and credibility.

But the court proceeds to show why, if they were sitting as a jury, they would not have believed a single one of these six witnesses. It dismisses the first two witnesses, Luban and Hallen, by showing they were convicts temporarily released from jail for the purpose of testifying and then concludes a review of their testimony by saying that "much of the testimony of these men is, as it seems to us, inherently improbable and unworthy of belief." Surely, this is a most astounding statement coming from an appellate court in reviewing the verdict of a jury who alone are supposed to pass on the credibility of a witness and whose opportunity for determining that fact is far superior to that of an appellate judge poring over a printed abstract through the small hours of the night.

The court takes up the testimony of the next four witnesses, Rose, Webber, Vallon and Schepps, and calls attention to the fact that they were testifying "under an agreement sparing their lives provided they would give evidence to convict the defendant." Then follows for several pages a close analysis of alleged discrepancies in the testimony of these four men, even going so far as to split hairs over the inferences to be drawn from the testimony that at the time Becker was planning the death of Rosenthal he was trying to defeat and discredit Rosenthal before the grand jury who were investigating the latter's charges that Becker was a "grafter."

It is unprofitable and unnecessary to follow the court through its difficult task of weighing each bit of the evidence offered as it only proves what is true in every criminal case that there are doubts and uncertainties that can only be solved by the men sworn to try the facts and who have opportunity to look a witness "in the eye" and observe his demeanor on the stand. Every lawyer knows that this is the best and final test of a witness' credibility and it is this that gives the verdict of a jury its importance and finality. It is certainly unfortunate if the public confidence in the verdict of a jury is going to be shaken by an appellate court's close analysis of the testimony upon which such verdict is rendered.

We wish to make our position clear. We may agree with the court that as we *read* the evidence which they set forth we would have decided the case for the defendant. But we insist that an appellate court is not responsible for the verdict but only to see

that the defendant had a fair trial and was not denied any of his rights to the material injury of his defense. Judge Hiscock's statement that an appellate court "should recoil from the proposition of taking the appellant's life" in view of the testimony shows a singular lack of appreciating his responsibility as an appellate judge. On the question of the defendant's guilt under the law and the evidence the jury is supreme and bears the full responsibility and does not share this responsibility in any particular with either the lower or the higher court. Much rather should an appellate judge recoil from disturbing a verdict of a jury who have performed their duty to society in pointing out a criminal whose conduct has been subversive to human government and dangerous to society and whose capacity and authority to decide that point is so superior to that of an appellate court.

There were many minor points of error alleged and discussed. We say minor, because of the fact that such errors are usually passed over by appellate courts generally as immaterial. Such errors, for instance, as the order of admitting testimony, the judge's harsh rejoinders to importunate counsel, the limitation of the right of cross-examination.

One of the curious features of this very unique opinion is the attempt of the court to excuse defendant's counsel for losing his temper while criticising the court for giving way to what it regards as a reasonable provocation. Thus the court says that "the defendant's counsel took several hundred objections and that whatever discretion was exercised against him by the presiding judge was but just repression and condemnation of methods which were obstructive and unwarranted." But the court goes on to show in behalf of defendant's counsel "extenuation of his conduct" in the "great responsibility, fatigue and nervous strain" incident to such a trial. Why such extenuating circumstances might not sometimes be pleaded in behalf of an overworked trial judge who must sit calmly through a long trial and be forced to decide in the spur of the moment "several hundred unwarranted and obstructive objections" thrown at him by counsel for defendant with no other idea than to confuse the court and the jury and obstruct the cause of justice, we never have been able to understand.

We stand firmly for the trial court and for the trial jury who labor through the heat and burden of the day and we deny emphatically the right of an appellate tribunal to go over the result of their efforts with the rule and compass to find immaterial flaws and imperfections in their work, and particularly to impeach their intelligence and competency and ruthlessly to set aside the verdict of the jury because, forsooth, the appellate judges would have rendered a different one.

The decision in the Becker case is even harder to understand when read in connection with the declaration in the case of People v. Decker, 157 N. Y. 186, where the court, in speaking of Sec. 528 of the Code of Criminal Procedure, said that "in determining whether a new trial shall be granted under it, it is not the province of this court to review or determine controverted questions of fact arising upon conflicting evidence, but that the jury is the ultimate tribunal in such a case, and that with its decision the court may not interfere unless it reaches the conclusion that justice has not been done."

The dissenting opinion of Mr. Justice Werner in the Becker case sets forth evidence which the majority of the court unfairly passed over corroborating the testimony of the "six alleged and confessed criminals" and which would have been sufficient in any court in this country to have given the case to the jury. Having shown this fact, Justice Werner rightly concludes that the majority of the court have no right to speculate as to the guilt or innocence of the defendant but that the jury's verdict is forever conclusive of that fact, saying:

"Judges may differ as to the effect and weight of testimony, but it still remains the law that when an issue of fact is created in a case triable by jury the character of the witnesses and the weight of their testimony cannot be disposed of by this court even in a case involving the death penalty."

We have carefully followed the criticism of this decision by the secular press, but only one such criticism has interested us. That is the editorial comment in the World's Work for April, 1914. This comment is as follows:

"The Court of Appeals criticises the trial court for precisely the reasons that led the popular mind to applaud it. Judge Goff insisted upon an expeditious trial. The higher court declares that the accused man had no fair opportunity to prove his innocence. Judge Goff refused to consider what he regarded as foolish interruptions or to permit the defendant's counsel to cross-examine witnesses indefinitely. On this ground the higher court denounces him as prejudiced.

"We need not necessarily criticise the New York Court of Appeals. Its decision falls in with the traditional spirit of American judicial institutions. The long period of time it took to reach the decision is also in accordance with conventional court procedure in this country. It presents such a striking illustration of our legal shortcomings, indeed, that it may serve a real public end. It may result in the miscarriage of justice in a particular case; it may facilitate it in the long run. It has given the newly established American Academy of Jurisprudence and the numerous similar movements for judicial reform in many states another picture of the problem that lies before them."

It seems that all the sincere efforts of the American Bar Association and of the local state bar associations to reform procedure and to minimize the opportunity for delay and reversal of verdicts and judgments is hopeless as against an appellate court who cannot get away from the tradition that all error is reversible error. The difficulty is in getting the appellate court away from the idea that they are in any way responsible for the result of the trial in the lower court. From confessions which appellate judges have made to us, we are confident that they sometimes improperly assume a heavy responsibility for the verdict in the case before them, and feel that unless they can be convinced beyond a reasonable doubt that justice has been done, that they ought to set aside the verdict. It is unnecessary to argue that this is a mistaken assumption of responsibility and that rather is the responsibility greater toward society not to disturb the finding of the jury upon whom alone society has imposed the duty and the responsibility of determining the guilt or innocence of an accused person. To disturb such a verdict unless the court is convinced affirmatively that justice has not been done or the substantial legal rights of the defendant have been violated is to breed anarchy and to destroy the confidence of the people in the administration of justice.

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## NOTES OF IMPORTANT DECISIONS.

**PARDON—EFFECT OF AS TAKING AWAY FIRST OFFENSE IN HABITUAL CRIMINAL LAWS.**—We discussed in 75 Cent. L. J. 51, in the case of Graham v. West Virginia, 224 U. S. 616, an habitual criminal statute imposing increased penalty upon a convict for a second conviction, where the first conviction was in another jurisdiction. The statute was upheld, the doctrine in McDonald v. Massachusetts, 180 W. S. 311, being adhered to. There it was ruled that this did not impose additional punishment for the crime committed elsewhere, "but is the heavier (in the new crime) if he is an habitual criminal," the state being allowed to call something a former crime for this purpose, though committed elsewhere.

Now the point is made, that if a pardon is set up as to that former crime, it is limitation on the power of the jurisdiction where it was committed, to say that it still may be called a former crime. Carlesi v. New York, 34 Sup Ct. ——.

The former crime was an offense against the United States and it had been pardoned by the president, and it was averred in an indictment that he had been convicted of a former offense for which the defendant had been arrested. He moved to strike out from the in-

dictment all references thereto, which motion the court disallowed.

Chief Justice White said: "The issue is a narrow one and involves not the determination of the operation and effect of a pardon within the jurisdiction of the sovereignty granting it, but simply requires it to be decided how far a pardon granted as to an offense committed against the United States operates, so to speak, extra-territorially as a limitation upon the state's excluding them from considering the conviction of a prior and pardoned offense against the United States in a prosecution for a subsequent state offense. It may not be questioned that the states are without right directly or indirectly to restrict the National Government in the exertion of its legitimate powers. It is therefore to be conceded that if the act of the state in taking into consideration a prior conviction of an offense committed by the same offender against the laws of the United States despite a pardon was in any just sense a punishment for such prior crime, that the act of the state would be void, because destroying or circumscribing the effect of the pardon granted under the Constitution and laws of the United States. And, of course, conversely, it must be conceded that if it be that the act of the state in taking into consideration a prior offense committed against the United States after pardon under the circumstances stated was not in any degree a punishment for the prior crime, but was simply an exercise by the state of a local power within its exclusive cognizance, there could be no violation of the Constitution of the United States. The whole controversy therefore is to be resolved by fixing the nature and character of the action of the state under the circumstances for the purpose of deciding under which of these two categories it is to be classed. When the issue is thus defined and limited its solution is free from the difficulty as it has been repeatedly and conclusively foreclosed by the prior adjudications of this court."

Under these rulings it was said not to be a limitation on the power of the United States in the granting of a pardon. It was said also: "We must not be understood as intimating that it would be beyond legislative competency to provide that the fact of commission of an offense after a pardon of a prior offense should be considered as adding an increased element of aggravation to that which would otherwise result alone from the commission of the prior offense." It does seem, however, that were a state to do this, it would be putting a very effective measure of relief on a pardon granted by another jurisdiction. It would have the effect of taking away very greatly from the efficacy of the pardon elsewhere, and, if the state granting the pardon specifically should provide that the offense should be blotted out as if never committed, this foreign statute would prevent it from having this effect.

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PRIVACY—RIGHT TO RECOVER DAMAGES FOR VIOLATION OF RIGHT OF.—A New York statute provides that any person, whose name, portrait or picture is used within that state for advertising purposes or the purpose of trade without the written consent of such person first obtained, may maintain an equitable action to prevent such use and to recover damages by reason of such use.

In a case where a moving picture concern designed a scenario for representing a collision at sea and the saving of the crew by means of wireless telegraphy, in which plaintiff was represented very prominently as the wireless operator on board a vessel at sea, the scenes were reproduced according to the best information the writer of the scenario could obtain of an actual occurrence. When it had been written it was then acted out for the moving picture films. Plaintiff sued and obtained injunction and damages for representations in New York and this holding the New York Court of Appeals sustains. Binns v. Vitagraph Co., 103 N. E. 1108.

After ruling that the plaintiff's picture, though it was actually that of one who impersonated plaintiff, was used for purposes of trade in defendant furnishing films to others who were to be amused thereby, and who paid therefor, holds that there was right of recovery of damages.

The principle of recovery seems to be on the statute making the doing of these acts a misdemeanor, but how they are to be estimated does not appear. The plaintiff has no copyright in his name or portrait and he does not sue in this case for libel. Upon what, then, may he recover? And is the measure of his recovery the profits made by the wrongful user? The only thing the court says on this subject is that: "This court cannot consider the question whether the amount of damages given by the jury in its verdict is excessive." This strikes us as a queer situation. A jury must be guided by rules of law in finding a verdict for damages, the court giving them the elements entering therein. In this case the damages recovered were $12,000, and it was claimed by plaintiff that: "He was greatly disturbed in mind and that his feelings were injured by the act of defendant and the inference which would be drawn therefrom that he had commercialized his fame thus accidentally received." The commission of the misdemeanor, then

is the predicate of damages and its effect upon the feelings of the party. It is not profits, which defendant makes, but solely the injury to one's reputation and in this respect the action is like that of libel. In such case there could be no recovery outside of the state having a law such as in New York.

DUE PROCESS OF LAW—TRIAL WITHOUT ARRAIGNMENT AND PLEA.—The U. S. Supreme Court reverses former ruling in Crain v. U. S., 162 U. S. 625, majority view, that a trial without a formal arraignment and plea was a denial of due process of law. The court says: "Holding this view, notwithstanding our reluctance to overrule former decisions of this court, we now are constrained to hold that the technical enforcement of formal rights in criminal procedure sustained in the Crain case is no longer required in the prosecution of offenses under present systems of law and that so far as that case is not in accord with the views herein expressed it is necessarily overruled." Garland v. State of Washington, 34 Sup. Ct. 456.

This case was on error to Supreme Court of Washington affirming a conviction of larceny, in a second trial on an amended information, there being a regular plea on the first trial, but no arraignment and plea on the second trial. When the case was called for trial and the jury impanelled, a general objection was made to the introduction of any evidence but no specific objection was taken to the want of formal arraignment.

The state court held, following former decisions, that failure to enter the plea had deprived accused of no substantial rights, as he waived arraignment by failure to make objection. It is recited by U. S. Supreme Court that these technical objections "originated in that period of English history, when the accused was entitled to few rights in the presentation of his defense," and "courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to accused any reason for strict adherence to the mere formalities of trial would seem to have passed away."

It is seen, therefore, that the court rules, that due process of law was not denied an accused, where he waived formal arraignment, all of which seems a clear conclusion.

This, however, is not the same question as involved in State v. O'Kelley, which we discussed in 78 Cent. L. J. 253, where a statute of Missouri required that there should be an arraignment, and upon arraignment, if defendant refused to plead, there should be a formal plea of not guilty. One of the judges in a concurring opinion in holding similarly to the Washington court, said that this statute "is the lion here in the path," and complained that the legislature had failed to amend it after its uselessness had been shown and its amendment suggested by a conference of judges. In other words, the court holds that as it is an old statute, retained against complaint of its uselessness, the court should get rid of it.

We think there is a difference between refusing to obey a statute, as prescribing a technicality, and the observance of due process of law, and in this way there is no similarity between the Garland and O'Kelley cases. The latter might be affirmed by the Federal Court and still the question would be up whether the court was justified in refusing to enforce a statute, which left the Missouri system of law upon the old lines of useless technicality.

## RECENT DECISIONS IN THE BRITISH COURTS.

A decision lately given in the Chancery Division on the subject of the good will of a trading business (Green & Sons, Northampton, Ltd., v. Morris, 6 February, 1914), suggests to us that statement of the present position of the law in this country on that point would be of practical use to practitioners in America.

The value of the "good will" of a business is sometimes difficult to ascertain. The good will is undoubtedly an asset of the business; generally a price can be obtained for it when the business is given up, and as an asset it passes to a trustee in bankruptcy. But its value must always be a more or less speculative question. The classical definition of good will is to be found in Lord Eldon's judgment in the leading case of Cruttwell v. Lye (17 Vesey, 335). He defines it as nothing more than "the probability that the old customers will resort to the old place." The associations and traditions of a well established coffee house, for example, may give the business conducted in it a special value, quite apart from the accident of who conducts it. In other cases the value of the good will may depend almost entirely upon the person who has carried on the business, the value of the locus being negligible.

It has been doubted whether in Scotland there can be a good will of a doctor's business which depends upon the personal skill of the doctor. At best it can be little more than the recommendation of his successor by the doctor to his patients, and the patients may have some excuse for suspecting that the recommendation

is given not so much because of the qualifications of the successor as because of the amount which he was willing to pay for the "practice." In the leading Scottish case upon this point (Bain v. Munro, 5R, 416), Lord Justice Clerk Moncrieff accepted as a correct statement of law this sentence from Smith's Mercantile Law: "Where the profits of the business result almost entirely from confidence in the personal skill of the party employed, as in the case of surgeons and attorneys, the good will is too insignificant to be taken notice of." In that case a doctor had died, and his widow sold his house to another doctor for £1,500, and the practice for £80 a year for five years. A creditor of the deceased doctor claimed this £400 as part of the deceased's estate, and therefore available to pay his debts; but the court held that what had been sold as good will was really not the good will of the doctor's practice, but the good will of the widow, who had undertaken to recommend the new man to her husband's old patients and that therefore the price was not part of the deceased's estate. But, on the other hand, there may be something in a doctor's house, just as in the case of a shop, which tends to bring people back; and even in Bain's case there was the right which the widow had, as executrix, of access to her husband's books and lists of patients, and there might be some value in this, so that on principle there seems to be no reason for denying the possibility of the existence of a good will in such a case, only it may be, "too insignificant to be taken notice of." In England the good will of such a practice has been recognized.

The development of the law as shown in the decided cases is interesting. In Cruttwell v. Lye, it was decided that a bankrupt whose business had been sold by his trustee might set up again on his own account. No question was raised as to the canvassing of old customers. In Labouchere v. Dawson (1872, 13 Eq. 332), it was decided that a vendor, selling voluntarily, might set up a new business and advertise publicly, but must not canvass his old customers. In Ginesi v. Cooper & Co. (1880, 14 Ch. Div. 599), the master of rolls, Jessel, held that a man in such a case must not deal with his old customers. In Walker v. Mottram (1881, 19 Ch. Div. 335), it was held that in a case of a compulsory sale by a trustee in bankruptcy, the bankrupt was entitled to set up a new business, and free to canvass his old customers. In Pearson v. Pearson (1884, 27 Ch. Div. 145), the court by a majority held that even in the case of a voluntary sale, there was no restriction on the right to canvass, thus overruling Labouchere. But this case in turn was overruled by the House of Lords in what is now the leading case on the subject in British law, Trego v. Hunt (1896, A. C. 7), where it was held that when a man had voluntarily sold the good will of his business he was not entitled to canvass his old customers, though he was entitled to deal with them if they came of their own accord. In the Scottish case of Dumbarton Steamboat Co. v. Macfarlane (1899, 1F. 993), a man who had sold his business as a carrier, including the good will, was interdicted from canvassing his old customers; but it was pointed out from the bench that there was nothing to prevent him from taking business from any of them who voluntarily came to him. In a more recent English case (Curl Brothers v. Webster, 1904 1 Ch. 685), Mr. Justice Farwell has carried this principle one step further, and held that though the seller may deal with old customers who come voluntarily to him, he must not invite them to return to him. The decision in Walker v. Mottram, which leaves a man free to canvass when the business has been sold by his trustee in bankruptcy, has now been followed by Mr. Justice Warrington in Green & Sons v. Morris. There a firm, being in financial difficulties, executed a deed of assignment to a trustee for behoof of its creditors. The trustee sold the business, including the good will, to Green & Sons. Morris, who had been a member of the firm, set up a rival busines in the same line of trade, and canvassed customers of the old firm for orders. Green & Sons asked for an injunction to prevent him from soliciting the customers of the old firm. Mr. Justice Warrington refused the injunction, holding that the rule which prevents the vendor of the good will of a business from canvassing his old customers does not extend to the case of a compulsory sale by a trustee for creditors.

The result of all this is, that when a man has voluntarily sold his business with the good will, he may, unless he has come under some special obligation to the contrary, set up a new business as a rival to the one he has sold. He may advertise the new business publicly, but he must not canvass his old customers. He may deal with them if they come to him, but he must not ask them to come back. On the other hand, if the sale has been carried through by a trustee in bankruptcy or a trustee for creditors, the man may start again without any restrictions upon his freedom in the way of obtaining customers. The trustee can only sell property, the voluntary seller can sell his rights as well as his property.

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## PRIORITIES VERSUS LIENS IN BANKRUPTCY.

In banking estates where the assets are insufficient to satisfy both lien claims and labor claims, the question has very frequently arisen as to which set of claims are entitled to payment. The decisions of the courts are in sharp conflict, some holding that the labor claims are entitled to preference over lien claims, and others holding vice versa. The solution of this question is a difficult one, and should be set at rest by appropriate legislation.

The payment of the labor claims is determined by Section 64b of Bankruptcy Act, which is as follows: "The debts to have priority except as herein provided, and to be paid in full out of the bankrupt's estate, and the order of payment shall be . . . (4) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of commencement of proceedings, not to exceed $300.00 to each claimant, the (5) debts owing to any person who by the laws of the state or the United States is entitled to priority. Section 67d of this Act provides that, "Liens given or accepted in good faith, and not in contemplation of or in fraud upon this Act, and for a present consideration which have been recorded according to law, if record thereof was necessary in order to impart notice shall to the extent of such present consideration only not be affected by this Act." The view that labor claims are entitled to prority of payment over liens is well supported.[1]

The view that the lien claims are superior to the labor claims is also supported by the cases.[2]

It is believed that a careful consideration of the material sections of the Bankruptcy Act will lead to the conclusion that the labor claims are superior to the lien claims. Section 64b of this Act regulates and determines the payment of all claims against the bankrupt estate. This section applies to "the debts to have priority except as herein provided and to be paid in full out of the bankrupt estate, etc." The expression is not the "unsecured" but "the" debts, and the expression "the debts" is equivalent to all debts. That this section does not apply to unsecured debts alone is evidenced by the fact that this section is not restricted to what are, technically, debts, but they are claims and very frequently are liens against the corpus of the estate. Neither is the cost of preserving the estate a debt, though it is a claim; and likewise as to the filing fees paid by creditors in involuntary cases, and costs of administration, including attorneys' fees. We see, therefore, that the section by its express terms applies to many things in addition to unsecured debts, and that there is no reason so far as Section 64 is concerned for holding that it applies to unsecured debts and not to liens. On the contrary the section seems to apply generally to all claims, including liens, and this conclusion is strengthened by the fact that Section 64 alone regulates expressly the order of the payment of claims against the estate.

It remains to be seen, however, whether or not Section 67d modifies or controls in any way the provisions under Section 64b. Section 67d provides that, "liens" given or accepted . . . shall to the extent of such present consideration only, not be affected by this Act. The first enquiry is, what does the expression "Shall . . . not be affected by this Act," mean? Certainly the words are not to be interpreted literally, for the bankruptcy Act does affect such liens. In the first place debts secured by liens must be proved in bankruptcy as all of the debts, and if not so proved are batred. Further the bankruptcy court has the right to sell the property upon which there is a lien, free of all liens. It

(1) In re Tebo, 101 Fed. 419; In re Erie Lumber Co., 150 Fed. 817; In re Consumers Coffee Co., 151 Fed. 933; In re West Side Paper Co., 159 Fed. 241; In re McDavid Lumber Co., 190 Fed. 97.

(2) In re Yorke Vitrified Brick Co., 180 Fed. 235; In re Proudfoot, 173 Fed. 733; In re Kirby Dennis Co., 95 Fed. 116.

seems reasonable, therefore, to hold that Section 67d simply preserves the liens mentioned therein without providing for the order of payment at all, and this conclusion is strengthened by the fact that, unless these liens were preserved by the Federal Act, they would be lost. Such an interpretation gives full effect to both Sections 64b and 67d, each being harmonious with the other and with the entire Bankruptcy Act.

This conclusion is strengthened by the general policy of the Federal law with reference to labor claims. Labor is essential to the productivity of the property in question; labor must be employed in order that the interest on the debt and the debt itself secured by the lien may be paid. And far more important, labor is usually from hand to mouth. Laborers are usually ignorant and unable to protect their rights, and are to a very large degree dependent upon their employers. Realizing this, Congress has provided that when misfortune has overtaken the common venture, the labor claims are entitled to priority over all other claims, except those specifically mentioned in Section 64b.

Assuming, however, that labor claims are not entitled to priority over those claims preserved by Section 67d the question arises, or rather it becomes essential to determine what liens are so preserved. The pertinent portion of the section is as follows: "Liens given or accepted in good faith, and not in contemplation of, or in fraud upon this Act, and for a present consideration . . . shall . . . not be affected by this Act." The words of the Act "given or accepted" import volition and intention on the part of the debtor and creditor. "Given" means "transferred," "conferred," "passed from one to another."[3] "Accepted" means "received with the intention to retain."[4] It would seem, therefore, that this section of the Bankruptcy Act, would apply only to those liens created by the acts of the parties themselves, and with the intention of creating or raising a lien, and not to those liens that are created by statute, as mill men's and mechanics' liens and landlord liens. Such liens are created by statute and not by contract.[5]

The liens preserved by the Bankruptcy Act, however, must be given or accepted in "good faith and not in contemplation of or in fraud upon this Act," and for a "present consideration." It is hardly conceivable, however, that the question of good faith enters into the creation or existence of statutory liens. It is difficult to conceive that such a lien could be given or accepted in "contemplation of or in fraud upon" the act, for the lien is given by statute (supra); the intention of the parties is entirely immaterial, their good faith or fraudulent intention does not enter into the matter at all. It is a principle of statutory construction, that certain things being enumerated, the statute will be applied only to those things and not to other things mentioned therein, and consequently in the instant case, not to liens created by statute.

The Bankruptcy Act further provides that, liens to be preserved must be for a "present consideration." Where goods are sold and services are rendered at the customary market price, what is "the present consideration" for a lien given by the statute for these goods or services? Manifestly there is none. The principle attempted to be set forth herein is applied in certain bill of lading cases containing a release of valuation clause. The courts have constantly held such stipulations void, unless it be shown that there is some consideration for this release of valuation clause, for example, a correspondingly reduced rate.

In conclusion it would seem, therefore: First, that labor claims are entitled to a priority of payment over all lien claims: Second, and in any event labor claims are entitled to priority of payment over statutory liens.

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(3) 20 Cyc. 1251.
(4) 1 Cyc. 221 (Standard Dictionary).
(5) Crawford v. Sterling, et al., 155 Ala. 511. 46 So. 849.

CONTRACTS—DURESS.

INGEBRIGT v. SEATTLE TAXICAB & TRANSFER CO.

Supreme Court of Washington. March 9, 1914.

139 Pac. 188.

Where one in good faith believes that he has been wronged and threatens the wrongdoer with a civil suit, and if the wrong includes a violation of the criminal law with a criminal prosecution, without a statement that prosecution has been commenced, and without an actual arrest, is not duress, so as to render a contract executed at the time void, as the threat, to be coercive, must be of an unlawful use of process.

GOSE, J. This is an action for damages (a) for a breach of contract, and (b) for the value of property obtained by duress. At the close of the plaintiff's testimony, the court withdrew the case from the jury and entered a judgment in favor of the defendant. The appeal followed.

(1) On the 23d day of September, 1912, the appellant was employed by the respondent for the period of one year under the terms of a written contract, whereby he agreed to furnish an assistant and a motor truck and devote them to the service of the respondent, in the conduct of its baggage business, from 7 a. m. to 12 o'clock midnight, at an agreed price of $15 per day. The appellant was allowed one hour off duty at "lunch time," and also at "dinner time," without deduction for loss of time. The contract further provided that the appellant should be allowed for overtime, but "that there should be no overtime for services performed at any time of the day or night except between 12 o'clock midnight and 7 o'clock a. m." The appellant was discharged on the 23d day of December, 1912. In his first cause of action he seeks to recover damages for a wrongful termination of the contract. In his second cause of action he alleges that the respondent, by threats of arrest and imprisonment, induced him to convey to it a motor truck of the value of $2,100, for a consideration of $335.

The applicant testified that the respondent had a contract for carrying all the baggage to certain hotels, and that he, knowing that fact, collected and retained the compensation for a part of it. He sought to justify his conduct by saying, "I always tried to do that during my noon hour or my lunch hour." When asked how often this happened, he said, "I don't remember." To the question, "When was your lunch hour?" he answered, "Any time I had time to take it;" that he "never had any regular lunch hour." This was a flagrant violation of both the letter and the spirit of his contract, and fully warranted the respondent in terminating it.

(2, 3) In respect to the second cause of action, the threats of imprisonment, the appellant testified that the president of the respondent said to him "that it wouldn't take Prosecuting Attorney Murphy but a short time to send me to Walla Walla;" that "it would be nice for you to lay up in jail to-night;" that "it wouldn't be very nice for you to lay upon the hill in jail to-night;" and that "you better settle up; give us the truck and square up." He was asked, "What, if anything, was said by either of them about when they would send you to jail?" and answered: "There was nothing said about what time, but they said this: That it wouldn't be very nice for me to stay in jail that night. A witness called by the appellant gave substantially the same testimony. The appellant had paid $1,335 on the truck. He conveyed it to the respondent and accepted its check for $335, which he later cashed, and still retains the money. He testified that the respondent claimed that he had received $1,500 for which he had given no account, and that he would not have conveyed to it the motor truck except for threats and through fear of going to jail, although he said that he did not know of any crime that he had committed. The testimony further shows that the settlement, which included the making of a bill of sale for the motor truck and a release of the contract of employment, occupied about two hours. During this time the appellant twice went away from the office of the respondent's president in company with its assistant manager, for the purpose of getting papers connected with the settlement, and his return in each instance was wholly voluntary. After returning the second time, he signed a bill of sale conveying the motor truck to the respondent, received its check, and signed a release of the contract. He testified that there was no representation that a criminal action had been commenced or that a warrant had issued.

Do these facts constitute duress? We think not. Under the appellant's testimony, he had unlawfully appropriated money which belonged to respondent. The respondent had a right to say to him that, if he did not settle, it would commence a civil action. It also had a right to point out to him that he was subject to a criminal prosecution. Under his own testimony, the good faith of the charge that he was subject to criminal prosecution cannot be questioned. It is not duress for one, who in good faith believes that he has been wronged, to threaten the wrongdoer with a civil suit; and

if the wrong includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution. Hilborn v. Bucknam, 78 Me. 482, 7 Atl. 272, 57 Am. Rep. 816. A mere threat to imprison, without an actual arrest, does not constitute duress. Bodine v. Morgan, 37 N. J. Eq. 426; Thorn v. Pinkham, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335. Threats of imprisonment, not accompanied with the statement that the prosecution has been commenced, do not constitute duress. Buchanan v. Sahlein, 9 Mo. App. 552; Sulzner v. C. L. & M. Co., 234 Pac. 162, 83 Atl. 103, 39 L. R. A. (N. S.) 421. In the case last cited the court said: "Ordinarily, when no proceedings have been commenced, threats of arrest, prosecution, or imprisonment do not constitute legal duress to avoid a contract; the threats must be made under such circumstances that they excite the fear of imminent and immediate imprisonment." The threat, in order to be coercive, must be an unlawful use of process. Loan & Protective Ass'n v. Holland, 63 Ill., App. 58. There is no duress where neither a warrant has been issued nor proceedings commenced. Elston v. Chicago, 40 Ill. 514, 89 Am. Dec. 361. "Threats of criminal prosecution, unaccompanied by threats of immediate imprisonment, do not constitute duress." Beath v. Chapoton, 115 Mich. 506, 73 N. W. 806, 69 Am. St. Rep. 589. See, to the same effect, Williams v. Stewart, 115 Ga. 864, 42 S. E. 256. "* * * It is those contracts made under fear of unlawful arrest, and not those executed under threat of lawful imprisonment, that can be avoided for duress." McCormick Harvesting Machine Co. v. Miller, 54 Neb. 644, 74 N. W. 1061. See, to the same effect, Alexander v. Pierce, 10 N. H. 494; Englert v. Dale (N. D.) 142 N. W. 169. "When a party seeks to avoid a contract because of duress by imprisonment, it is not enough simply to show that he was imprisoned. He must go further and show that the imprisonment was unlawful, or, if lawful, that while imprisoned he was subjected to some coercion that deprived him, in some respect, of his free agency." Harrison Township v. Addison, 176 Ind. 389, 96 N. E. 146.

The appellant's testimony shows that he was knowingly guilty of moral turpitude; that the respondent claimed that he had appropriated $1,500 of its money; that it offered to settle on the basis finally agreed upon; that its officers pointed out to him that he was subject to arrest and imprisonment; that after a full discussion, and after he had twice left the office and voluntarily returned, he made the settlement. It seems conclusive that, under the admitted facts, it would be trifling with the law to submit the case to a jury. Upon the appellant's own testimony, and upon the testimony of his only witness, the court would be compelled to set aside a verdict in his favor, if one should be returned.

Appellant has cited authorities which seem to sustain his contention that the case should have been submitted to the jury upon the second cause of action. They are, however, in conflict with the weight of authority and what we deem to be the better rule. They are also in conflict with the principle announced in Thorne v. Farrar, 57 Wash. 441, 107 Pac. 347, 27 L. R. A. (N. S.) 380, 135 Am. St. Rep. 995. The better view is that one smarting under a wrong in seeking civil redress may say to the wrongdoer that he is subject to a criminal prosecution, if the wrong is both civil and criminal in its nature, and that a settlement of the civil injury under such circumstances is not subject to the reproach of duress. The case was correctly decided on both causes of action.

The judgment is affirmed.

BROW, C. J., and ELLIS, MAIN, and CHADWICK, J. J., concur.

NOTE.—*Threat of a Lawful Arrest as Duress Invalidating a Contract.*—It would seem that there is much authority for the proposition laid down by the instant case, that the mere mention of prosecution and imprisonment, if one does not settle, does not *ipso facto* avoid a contract, though it may be thought it was because only of such mention that the contract was entered into. This is ordinarily the rule, but the circumstances may be gone into. Thus where an aged lady under great fear and agitation of mind, because of a threat by defendant to put her son in jail before night, the defendant being a man of violent disposition, entered into a contract, it was set aside. Jordan v. Elliott, 13 W. N. C. 56.

And in an Alabama case where a mother was told that there were threats of prosecution of her son and being in great grief and distress of mind she signed away a deed to her property, the conveyance was set aside as having been obtained by duress. Martin v. Evans, 163 Ala. 657, 50 So. 997.

In Ellyson v. Schoaler, 149 Iowa 332, 128 N. W. 551, where a married woman signed notes to prevent a prosecution of her husband for forgery and she claimed she was induced to do this as a means of saving her son, then fifteen years of age, from the disgrace to result to him if his father were sent to the penitentiary, this was held to constitute duress avoiding the notes.

And in Nebraska Central B. & L. Assn. v. McCandless, 83 Neb. 536, 120 N. W. 134, where a lawyer had converted money belonging to a client to his own use, and the client went to the lawyer's home, in his absence, and threatened to commence criminal proceedings against him, a mortgage executed by his wife to secure the amount was held unenforceable in equity.

In International Harvesting Co. v. Voborill, 187 Fed. 973, 110 C. C. A. 311, Judge Hook says: "Susceptibility to coercive influence is not uniform, and in determining the question of

duress, sex, age, state of health, family conditions, etc., may be considered with other circumstances. . . . He must assume from the verdict and evidence that threats were made to have her husband arrested and jailed unless she signed and guaranteed the notes, and we cannot say as a matter of law that they were insufficient under the circumstances to deprive her of that freedom of will essential to voluntary action. All men appreciate how susceptible the mind of a wife and mother is to such influences when the liberty of husband and father is believed to be at stake."

In Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417, the court described the old law as requiring that duress could exist only where there was such threat of danger to the object of it as was deemed sufficient to deprive a constant and courageous man of his free will. Duress strictly so-called was a matter of law. Then it became what was sufficient to overcome the will of a man of ordinary firmness. Now it is said that: "Duress in its broad sense, now includes all instances where a condition of mind of a person, caused by fear of a personal injury or loss of limb, or injury to such person's property, wife, child or husband, is produced by the wrongful conduct of another, rendering such person incompetent to contract with the exercise of his free will power, whether formally relievable at law on the ground of duress or in equity on the ground of wrongful compulsion. . . . The law no longer allows a person to enjoy, without disturbance, the fruits of his iniquity, because his victim was not a person of ordinary courage." In this case the evidence shows a hard-working, middle-aged farmer, induced by threats of arrest and imprisonment, making a settlement and the contract was set aside.

In Bentley v. Robson, 117 Mich. 691, 76 N. W. 146, there was a mortgage by an old lady to save her son-in-law from jail, and it was held void for duress.

In Leflore County v. Allen, 80 Miss. 298, 31 So. 815, there was a threat against a defaulting county treasurer with prosecution unless the wife would convey all her property to the county. She refused, but later, while her husband was still liable to prosecution and on renewal of the application she did, the deed was held void, notwithstanding that the threats were not repeated.

In Benedict v. Roome, 106 Mich. 378, 64 N. W. 193, merely mentioning to a wife that her husband was guilty of embezzlement and seeing her time and again about getting security therefor, was held sufficient to have a mortgage set aside on the ground of its procurement by duress. The court said: "Mr. W. and his attorney studiously sought to avoid any such threats as would vitiate the security they might make. If the court were to be governed by the words used to her by them, the position of defendants might be sustained; but we cannot ignore the conclusion that the conduct of her husband was suddenly disclosed to her, that she understood he had committed a crime and that the papers referred to by Mr. W. as lying upon the table were prepared as the basis of a criminal prosecution, we think it clear that she gave the mortgage under an implied threat of criminal prosecution."

Many other cases of this kind might be produced but the substance of them generally is, that if the threat coerced one to do what he would not otherwise do, that the old rule of its overcoming the will of a firm person no longer obtains. C.

## ITEMS OF PROFESSIONAL INTEREST.

### RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS' ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.*

**In answering questions this Committee acts by virtue of the following provisions of the by-laws of the Association, Article XVI, Section III:**

**"This Committee shall be empowered when consulted to advise inquirers respecting questions of proper professional conduct, reporting its action to the Board of Directors from time to time."**

**It is understood that this Committee acts on specific questions submitted *ex parte*, and in its answers bases its opinion on such facts only as are set forth in the question.**

**QUESTION NO. 42.**

**A is a practicing attorney in this state. B is a member of the bar of a Western state, but has moved to New York City. B's business in New York City is looking after his own investments. In the course of B's business a considerable amount of legal work comes to him, which he can not handle because he is not a member of the bar of this state, and he desires to turn over all such legal matters to A for attention, upon condition that A will give B a portion of the fees received in such matters.**

**Is it the opinion of your committee that it would be unprofessional for A to make such arrangement with B?**

**ANSWER No. 42. The Committee is of the opinion that any division of fees by a lawyer should be based upon a sharing of professional responsibility or of legal services, and no such division should be made except with a member of the legal profession associated in the employment as a lawyer. Any other division would appear to be a mere payment for securing professional employment, which is to be condemned.**

*Questions 43 to 46 answered in 78 Cent. L. Journal 75; question 47 in 78 Cent. L. Journal 298.

If in the question propounded, the employment of B is by clients to whom he assumes responsibility by reason of his office as a lawyer in the Western state, we should not consider the division improper *per se*, though it is still possible that section 274 of the Penal Law might condemn it.

On the other hand, the question seems to mean that the employment is not the result of the Western lawyer's practice for clients in his own state, but rather the creation of employment as a lawyer in New York by reason of the Western man's activity as a business man in New York. If this interpretation be correct, we would consider the division improper: it might (under some circumstances which we do not assume to construe) even be a violation of section 274 of the Penal Law, which is as follows:

"Section 274. BUYING DEMANDS ON WHICH TO BRING AN ACTION.

An attorney or counsellor shall not:

1. Directly or indirectly, buy, or be in any manner interested in buying, a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.

2. By himself, or by or in the name of another person either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof. But this subdivision does not apply to an agreement between attorneys and counsellors, or either, to divide between themselves the compensation to be received.

QUESTION NO. 49.

I have in my employ a clerk of mature years, who wishes to have cards printed showing that he is connected with my office. He has submitted to me a draft of such a card in the following form:

A..... B.....
with C..... D.....
Counsellor at Law
(Address)
(Telephone)

In the opinion of the committee would such a card convey the impression that I am holding out this clerk as a lawyer, or is it, in the opinion of the committee, objectionable for any other reason?

ANSWER No. 49. The Committee is not advised of any valid reason why the clerk, not being admitted to the bar, should use a card referring to the attorney; and it appears to be beneath the essential dignity of the professional position of the attorney to permit its use, while likelihood of its abuse seems obvious.

QUESTION NO. 50.

At a social entertainment given by citizens who are members of a single race, to honor a distinguished man of their number, a program was published and circulated containing paid advertisements, of which one is the following:

Telephone..... Residence Phone.....
LARGE ACCIDENT, MATRIMONIAL & CRIMINAL ACTION A SPECIALTY
ALL MATTERS STRICTLY CONFIDENTIAL
.....(Name)
LAWYER
..... (Address) .....
A.....(stating advertiser's race) lawyer, who is a.....(stating race of distinguished guest) man's friend. Indorsed by leaders of the community. Has estimable record in all Courts.

Is it the opinion of the committee that this is proper professional advertising?

ANSWER No. 50. In the opinion of the Committee the advertisement set forth in the question is improper. (See Canon 27 of the American Bar Association.)

QUESTION NO. 51.

There are some collection agencies in town which are incorporated and which solicit bills for collection. It is their custom to turn over some of them to lawyers for suit. In such cases the collection agency always wishes to deal with a lawyer as if it were his client and wishes collections remitted to it instead of directly to the creditor. In your opinion, is not that method of doing business improper? This question arises frequently and is quite troublesome because, so far as I know, there has been no adjudication of the matter.

ANSWER No. 51. In the opinion of the Committee, the patron of the collection agency is the client, but the Committee sees no impropriety in the lawyer's complying with the wish of the collection agency in remitting to it; assuming (as the Committee does) that the agency is the authorized agent of its patron to deal in his behalf with the lawyer. (See our answers to Question No. 47.)

QUESTION NO. 52.

First: When a judge of a court of review or of last resort has a dispute which he wishes to litigate, may he, without impropriety or a

breach of the ethics of the profession, prosecute his suit in a court from which an appeal or writ of error lies to the court of which he is a member? Or should he, before bringing suit, resign from his office as judge?

Second: When the judgment in such case comes before the court of review or of last resort, of which the plaintiff is a member, is it sufficient to meet the requirements of the ethics of the profession, or for the due, proper, and impartial administration of the law, for the reviewing court in deciding the case merely to say that the plaintiff in the case did not sit? Or, if not, what is the proper action?

ANSWER No. 52. *First:* In the opinion of the Committee, the judge may properly prosecute his suit without resigning his office.

*Second:* The reviewing court could, it seems to the Committee, be fully expected to deal properly with the case. The plaintiff should, of course, not sit as a judge in his own cause, but this does not disqualify his colleagues, who should not (and doubtless would not) permit him to participate in their deliberations or influence them in any way whatever. It does not seem to us that any formal action or comment of any sort by the court upon the judge's disqualification is necessary. A proper precaution to avoid possible, but not probable, misunderstanding would be an informal announcement that the disqualified judge did not participate in the deliberations or action of the court.

In the opinion of the Committee, the judge should not personally try or argue his own cause.

QUESTION NO. 56.

I invite the expression of the opinion of the Committee in respect to the following suggestion about which I have been recently consulted:

A receiver and his counsel agree to divide their fees, i. e., the receiver to pay to his counsel one-half of the commissions which the court might allow to him, and the counsel to pay to the receiver one-half of the amount which the court awarded to him as counsel for the receiver.

Query: 1. Was this agreement void as against public policy?

2. If not void, was it proper according to proper ethics?

ANSWER No. 56. In the opinion of the Committee, the agreement is contrary to the proper rules of professional conduct, and is probably illegal.

## PUBLIC ESTHETICS AS A BASIS FOR LEGISLATION.

An inherent function of sovereignty, as *parens patriae*, is to protect social interests. The police power to regulate the exercise of individual property rights, or, if necessary, to destroy the property itself, springs from the necessity of this function. But to be entitled to such legislative protection the interest must be one that is actually recognized and one the promotion of which will benefit, at least indirectly, the public as a whole. Although these interests were originally thought of as confined to health, safety and morals, the courts are unquestionably tending toward a broader test. A recent case, on the other hand, holds that public esthetics is not such an interest, and that a statute is unconstitutional which prohibits the building of retail stores in residential sections without the consent of a majority of the abutters (People v. Chicago, 103 N. E., 609, Ill.). This view is consistent with the authorities.

It has been urged that unsightliness may be legislated against as much as smoke or noise. But the two groups are distinct. The comfort or even health of substantially every one in the neighborhood is disturbed by smoke and noise, and so its prevention is of direct public benefit. Probably the display of revolting diseases in patent medicine advertisements could be prohibited on this ground. But only a limited group of esthetes can be thought of as suffering serious discomfort or inconvenience from the spectacle of unsightly buildings. True, the public may be uplifted by the presence of architectural beauties, but it is not offended by their absence. There is therefore no direct harm to the public as a whole. Nor is the social interest in the protection of the individual or the fastidious few from esthetic discomfort strong enough to justify the restriction of personal liberty. Legislation to protect the weak, poor and unfortunate from economic duress presents extreme examples of the justifiable use of the police power in favor of a particular class. On the score of the social interest involved there is a clear distinction between such legislation and a statute shielding the esthetic members of the community from sense discomfort. The police power, it may be said, exists to protect, not to uplift. Thus, esthetic considerations, it would seem, fall outside the scope of the police power until the sensibilities of the community as a whole become so highly developed that the public is shocked and disturbed by what is ugly.

In the exercise of the right of eminent domain the sovereign is thought of not as a protector, but as a purchaser of private property

for public use. Esthetic considerations are therefore more pertinent. As to the meaning of public use the authorities are in great confusion. But whatever distinctions may be taken as to the degree of utility necessary, it would seem that the benefit must accrue to the community as a whole, not merely to a particular class. The foregoing discussion of the police power presupposed a state of society where the average individual would not be seriously shocked by the sight of an ugly building. Conversely, it may be assumed, to the average pedestrian the spectacle of symmetrical architecture will pass unnoticed. To exercise the right of eminent domain by imposing such building restrictions is comparable to appropriating an easement of light where a majority of the community is blind. Under the test requiring actual use by the public, only a limited class would use the view; under that of public benefit the advantage would be negligible.

Esthetic considerations, on the other hand, may be incidental to some other public use. A Massachusetts statute limiting the height of buildings around a public park was passed to secure beauty as well as an easement of light and air. Land has been condemned for roads leading nowhere but to beautiful views. But the public as a whole actually used the easement of light and air or the public drive whether they were conscious of the esthetic advantages or not.

A further distinction should be noticed as to motive. Gettysburg Park was built for the avowed purpose of fostering a spirit of national patriotism. But here again the public user of the land taken was assured. The education of the public esthetic sensibilities, however desirable, is no justification until the further element of public user is present.—*Harvard Law Review*, Vol. XXVII, April, 1914, p. 571.

## CORRESPONDENCE

### LIABILITY OF INDEMNITY COMPANIES.

Editor Central Law Journal,
420 Market Street,
St. Louis, Mo.

Dear Sir:

We are much interested in your two articles contained in Volume 78, at page 181, and in Volume 78, at page 235.

We have been informed that there are some decisions to the effect that where an indemnity company refuses to accept a compromise proposed, within the limitation of the policy, that it would be liable to the insured for the excess above the limitation, in the event that the person damaged should recover judgment against the insured for an amount larger than the limitation. We have never been able to find any such cases. If you know of any, or could direct us to any person who is familiar with the subject so that we could get the information from him, we shall be obliged.

Very truly yours,
DEVLIN & DEVLIN.

Sacramento, Cal.

NOTE.—We have not come across any cases directly in point but publish the above as suggesting a very interesting query. Several articles, however, have appeared in this journal treating generally of the validity of these contracts from the standpoint of their substitution, without the consent of the other party to a claim, of practically a new debtor and controlling the litigation thereafter. See 71 Cent. L. J. 37. And in one case discussed it appeared that one of these companies was held for procuring a release of its indemnitee through false and fraudulent representations, a question in some respects bearing on the query. 76 Cent. L. J. 442. The two cases we consider in our Editorials inquired about merely suggest the query we have considered. EDITOR.

## HUMOR OF THE LAW.

The negro teamster had been arested for using his whip too freely on the public streets.

"You are charged with cruelty to animals," said the Judge. "How do you plead?"

"Why, Jedge," answered the prisoner, "I wa'n't crool to no animiles. Them beasts dat I wuz lickin' war mewls."—Buffalo Express.

An Atlanta man tells of a fine Jersey cow that had escaped from her owner's lot and was recently roaming the streets of the Georgia capital. Pretty soon she was roped in by the poundmaster. This action drew a moving appeal from the owner, who addressed the chief of police in these terms:

"Your pound man has hauled my cow into court for prowling. As it was her first offense, please let her off with as light a fine as possible."

The chief, who is a good fellow, made this official endorsement on the letter and sent it to the poundmaster:

"You will release this cow on her own recognizance."

It was in the heat of a run upon a bank in Washington. Many of the depositors were negroes, and for hours Unc' Ephriam had shuffled on in the nervous, melancholy line of those who still hoped to recover their savings. He was within a very few feet of the entrance when down the line came shuddering the words: "The bank's done close!"

Unc' Ephriam, harking back to ancestral African days, lifted up his voice and vexed the circumambient air with transcendent ululations. "Shut up!" growled a policeman, fearful of a riot in the panicky state of the crowd. "Didn't you ever see a bank bust before?"

"Coas' I seen 'em bus' befo,'" wailed Unc' Ephriam, "coas' I seen 'em bus' befo.' But dis is de fust one dat ever done bus' right in mah face!"—N. Y. Evening Post.

## WEEKLY DIGEST.

**Weekly Digest of All the Current Opinions of All the State and Territorial Courts of Last Resort, and of all the Federal Courts.**



1. **Bankruptcy**—Amendment.—A petition in bankruptcy is amendable, and if the amendment does not set up new matter, or a new cause of action, the amended pleading will be regarded as a continuation of the original, and will relate back so as to take effect as of the date the original was filed.—In re Louisell Lumber Co., C. C. A., 209 Fed. 784.

2.——Credit.—Where a bank loaning money to the bankrupts on warehouse receipts as collateral would not have done so without a financial statement, which was furnisned and was untrue, such loan was a credit. In re Savarese, C. C. A., 209 Fed. 830.

3.——Discharge.—A discharge in bankruptcy affects only the liability of the bankrupt and will not release his comaker from liability on a joint note.—Commercial Bank of Boonville v. Varnum, Mo., 162 S. W. 1080.

4.——Farming.—A partnership engaged chiefly in farming is not subject to bankruptcy adjudication under Bankr. Act, § 4b, as an "unincorporated company."—H. D. Still's Sons v. American Nat. Bank, C. C. A., 209 Fed. 749.

5.——Indorsers.—Where indorsers of notes of the bankrupt paid a portion of the debt and secured their release as indorsers and the holders proved the notes for the entire amount against the bankrupt's estate, the indorsers were not entitled to prove the amount paid by them as claims against the estate, since under Bankr. Act, § 57i, they were only entitled to receive from the holders any overplus, after crediting dividends received from the bankrupt's estate and the amount paid by the indorsers.—In re Manhattan Brush Mfg. Co., U. S. D. C., 209 Fed. 997.

6.——Insolvency.—Where the act of bankruptcy alleged was the making by the alleged bankrupt of a general assignment for the benefit of creditors, whether the bankrupt was insolvent was immaterial.—Corbett v. Riddle, C. C. A., 209 Fed. 811.

7.——Insurance Policy.—Where a policy on a bankrupt's life was payable to his wife in case of death before the end of 20 years and he was adjudged a bankrupt before such period expired, the policy having no cash surrender value prior to that time, the bankrupt's trustee acquired no interest therein because it provided certain valuable benefits which the bankrupt was entitled to in case he survived the period.—In re Churchill, C. C. A., 209 Fed. 766.

8.——Jurisdiction.—A bankruptcy court having first acquired jurisdiction of the bankrupt's estate by the filing of a petition in bankruptcy, such jurisdiction is exclusive of the right of the state court to entertain jurisdiction of an action in detinue by a claimant to recover property alleged to belong to the estate.—Corbett v. Riddle, C. C. A., 209 Fed. 811.

9.——Lien.—A lien on personal property to secure purchase money under Code Miss. held a lien created by statute and not by judicial proceedings, where a suit was brought to enforce the same within four months prior to bankruptcy, and was not affected by Bankr. Act 1898, § 67d.—Norris v. Trenholm, C. C. A., 209 Fed. 827.

10.——Lien.—The title of a receiver in bankruptcy relates back to the filing of the petition, and the rights of the parties as to an incumbrance issued by the bankrupt to delay and hinder his creditors must be determined as of the time of the filing of the petition.—Clement v. Saratoga Holding Co., 145 N. Y. Supp. 628.

11.——Perishable Property.—"Perishable property," as used in General Bankruptcy Order 18 permitting the court in its discretion to direct sale of perishable property, held not limited to the property which deteriorates physically, but includes that liable to deteriorate in value and price by reason of delay in the disposition thereof.—In re Pedlow, C. C. A., 209 Fed. 841.

12.——Preference.—Where an alleged bankrupt while hopelessly insolvent paid a creditor in settlement of an antecedent debt, such payment was a preference and an act of bankruptcy, though the insolvent had no actual intent to prefer.—In re Condon, C. C. A., 209 Fed. 800.

13.——Torts.—A discharge in bankruptcy does not bar a tort action for the death of a servant caused by the bankrupt's negligence.—Pearlman v. Booth, 145 N. Y. Supp. 539.

14. **Banks and Banking**—Banker's Right.—As money has no earmarks, but passes from hand to hand without inquiry as to one's right thereto, a bank's right to apply a deposit of money to an indebtedness due from the depositor cannot be defeated because of secret equities in favor of a third person.—Wilson v. Farmers' First Nat. Bank, Mo., 162 S. W. 1047.

15. **Carriers of Goods**—Bill of Lading.—A stipulation in a bill of lading against liability of the carrier for damages, unless claim be presented within four months after delivery of the property, is valid.—Peninsula Produce Exchange of Maryland v. New York, P. & N. R. Co., Md., 89 Atl. 437.

16.——Custom.—Because the carrier's agents possibly knew the designation of a car load shipment will not render the carrier liable as an insurer, where the shipping order had not been delivered to the carrier as was the shipper's

custom.—Nelson v. Cheapeake & O. Ry. Co., Ky., 162 S. W. 1129.

17.——Limiting Liability.—A carrier's common-law liability for safe carriage of interstate shipments may be limited by a special contract supported by a consideration which is reasonable and fairly entered into by the shipper.—St. Louis & S. F. R. Co. v. Cox. Peery & Murray, Okla., 138 Pac. 144.

18. **Carriers of Live Stock**—Delay.—Where a shipper has demanded a car for a shipment of sheep and been promised same by the carrier's station agent, and a reasonable time has been taken for furnishing same, further inexcusable delay will render the carrier liable for the resulting damages.—Midland Valley R. Co. v. Larson, Okla., 138 Pac. 173.

19. **Chattel Mortgages**—Foreclosure.—Unsecured general creditors of a chattel mortgagor cannot appear in foreclosure proceedings, in which a receiver was appointed for the mortgagor, and insist that defenses to the validity of the mortgage be made, unless the foreclosure is collusive.—Commonwealth Trust Co. v. Salem Light, Heat & Power Co., N. H., 89 Atl. 452.

20. **Common Carriers**—Carmack Amendment.—A shipper could recover damages for a decrease in the market value of strawberries shipped due to delay in transportation and delivery, under the Carmack Amendment to the Interstate Commerce Act.—New York, P. & N. R. Co. v. Peninsular Produce Exchange of Maryland, Md., 89 Atl. 433.

21. **Contracts**—Ambiguity.—If a contract is so clear that it conveys but one idea to every reasonable mind, it is not open to interpretation; the question whether a document is ambiguous being a matter of impression rather than of definition.—Butte Water Co. v. City of Butte, Mont., 138 Pac. 195.

22.——Breach.—Where the owner breaches a building contract by declaring it at an end, and letting the work to another, the contractor may withdraw it and sue for damages.—Union Fibre Co. v. Aaron Poultry Co., Mo., 162 S. W. 1046.

23.——Election.—An owner damaged by breach of a contract to construct a building may either recover such damages in an independent action, or a set-off or counterclaim in an action by the contractor.—Waco Cement Stone Works v. Smith, Tex., 162 S. W. 1158.

24.——Election.—Where a party has an election to rescind a contract, he must rescind it wholly and cannot consider it void for one purpose and in force for another.—Cordon-Tiger Mining & Reduction Co. v. Brown, Colo., 138 Pac. 51.

25.——Illegality.—In an action to recover a share of the profits and commission on a sale of books, proof that fraud was practiced by the parties in one transaction, and that in another there were claims of fraud, is insufficient to show that the entire contract was based on illegal methods, so as to warrant a denial of all relief to plaintiff.—Lamb v. Tomlinson, Ill., 103 N. E. 1058.

26. **Corporations**—Consolidation.—One corporation, which takes over the franchise and property of another, so as to become the same corporate entity under another name, is liable for the debts and obligations of the succeeded corporation.—Zachra v. American Mfg. Co., Mo., 162 S. W. 1077.

27.——Foreign Corporation.—A foreign corporation, which has appointed an agency to receive service of process cannot revoke such agency so as to invalidate service on the agent, where the cause of action sued on arises out of a contract made in the state in the exercise of its franchise.—Meixel v. American Motor Car Sales Co., Ind., 103 N. E. 1071.

28.——Minority Stockholders.—In a suit by minority stockholders against the corporation and directors to set aside a sale of the corporate property property for an insufficient price ,other stockholders are not entitled to intervene as parties defendant.—Hay v. Brookfield, 145 N. Y. Supp. 543.

29.——Notice.—A pledgee of stock certificates, which showed on their face that they were issued to a trustee, took them subject to the right of the trustee and the cestui que trust to reclaim possession, but the receiver of the person, who had the stock issued in the name of the trustee, could not claim possession.—Hickok v. Cowperthwait, N. Y., 103 N. E. 1111.

30.——Pledge.—Where a pledgee of stock certificates wrongfully pledged the same for his own debt and on the maturity thereof tendered payment the fact that he then demanded return of the collaterals did not render his tender conditional.—New York Assets Realization Co. v. McKinnon, C. C. A., 209 Fed. 719.

31.——Promoter.—A promoter of a corporation, who brings about its organization and aids in securing subscriptions, occupies a fiduciary relationship toward the corporation, its stockholders, and those expected to buy stock, and, where he expects to be paid for his services, it should be made clear to all of them.—Cushion Heel Shoe Co. v. Hartt, Ind., 103 N. E. 1063.

32. **Covenants**—Personal.—The part of a covenant in a deed conveying a lot with sufficient water power from a wheel in grantor's mill to turn a shaft, which provided that grantor should "construct and maintain said shaft," was an affirmative covenant which did not run with the land, and the expense of maintaining the shaft must be borne by a subsequent grantee of the lot.—Miller v. Clary, N. Y., 103 N. E. 1114.

33. **Criminal Law**—Hearsay Evidence.—On a trial for using instruments on a pregnant woman with intent to procure a miscarriage, the testimony of such woman that she left a request with accused's wife to have him call her up on his return to his office was not hearsay but evidence of fact.—Larkisian v People, Colo., 138 Pac. 26.

34.——Election.—In a statutory rape case, the state need not elect upon which act of intercourse it will rely until the close of the evidence; evidence of the several acts being admissible.—People v. Duncan, Ill., 103 N. E. 1043.

35.——Res Gestae.—Where defendant was charged with maliciously taking down a gate, it was error to exclude evidence to what was said by the boys doing the act showing that there was no intent to injure the property; it being res gestae.—Meador v. State, Tex., 162 S. W. 1155.

36.——Similar Offenses.—In a prosecution for obtaining money by the confidence game, evidence of similar transactions by accused, occurring a few weeks before and after the

one involved, held admissible.—Elliott v. People, Colo., 138 Pac. 39.

37. **Damages**—Building Contract.—The measure of damages for breach of a building contract by furnishing inferior material is usually the difference between the value of the work done and that contracted for; but recovery may be allowed only for the difference between the cost of replacing the inferior work and material.—Waco Cement Stone Works v. Smith, Tex., 162 S. W. 1158.

38. **Death**—Pleading.—The petition, in an action by an administratrix for wrongful death, failed to state a cause of action, where it did not allege that there was no husband, minor children, etc., to whom the right to first bring the action is given.—Maier v. Metropolitan St. Ry. Co., Mo., 162 S. W. 1041.

39. **Deeds**—Delivery.—The retention of a deed by the grantor is not inconsistent with its contemporaneous delivery at the time of its execution, when a life estate in the property conveyed is reserved to the grantor.—Buck v. Garber, Ill., 103 N. E. 1059.

40. **Easements**—Personal Covenants.—Where a grantor describes a lot conveyed as bounded by an unopened street plotted upon a recorded plan made by him, he impliedly convenants that he will open the street at least for the use of his grantee, though the street has not been plotted upon a city plan.—Shetter v. Welzel, Pa., 89 Atl. 455.

41. **Estoppel**—Pleading.—Where the facts pleaded and proved established defendant's right to relief by estoppel, his failure to allege that by reason of such facts plaintiffs were estopped is immaterial.—Molina v. Ramirez, Ariz., 138 Pac. 17.

42. **Executors and Administrators**—Estoppel.—Where an administratrix with the will annexed, told the beneficiaries under the will that she would not assert any claim against the estate, and afterwards, without notice, filed a personal claim which was allowed, equity will set the allowance aside.—Taylor v. Marshall, Colo., 138 Pac. 25.

43.——Final Settlement.—A suit to vacate an order approving an administrator's final settlement is a direct attack thereon, though plaintiff seeks other relief in the same suit.—Johnson v. Filtsch, Okla., 138 Pac. 165.

44.——Separate Set of.—Where a person dies seised of property in different countries and makes separate wills, separate sets of executors may be appointed who will have jurisdiction only of the property in the country in which they are appointed.—In re Mayer, 145 N. Y. Supp. 665.

45. **Extradition**—Habeas Corpus.—A person charged with a misdemeanor only in extradition proceedings is entitled to bail as a matter of absolute right, both under the state and federal laws, unless his enlargement on bail would be a menace to the community.—Ex parte Thaw, U. S. D. C., 209 Fed. 954.

46. **Fraudulent Conveyances**—Homestead.—A debtor may fix his homestead upon any lands he may own, regardless of his debts and his creditors, if he can do so before any lien attaches to the land, and it makes no difference that the land has been conveyed to defraud creditors previous to a judgment.—Sears v. Setser, Ark., 162 S. W. 1083.

47. **Gifts**—Delivery.—Delivery of a bank book to donee, together with other means to effect the transfer showing decedent's intent to make a gift and the donee's acceptance thereof, held to constitute an effective executed gift.—Frentz v. Schwarze, Md., 89 Atl. 439.

48. **Homicide**—Dying Declarations.—A dying declaration is admissible in evidence only when the court is reasonably satisfied by evidence aliunde that it was made under a sense of impending death.—People v. Profumo, Cal., 138 Pac. 109.

49. **Husband and Wife**—Alienation of Affections.—In a wife's action against her husband's parents for alienation of affections, the burden is on plaintiff to show a direct interference, and that defendants were inspired by malice.—Brison v. McKellon, Okla., 138 Pac. 154.

50.——Community Property.—Where real property was acquired from the government by a husband during marriage, it was community property, and hence, on the dissolution of the community by the death of the husband, the property passed without probate proceedings or other legal action—one half to the widow and the other half to the children of the marriage.—Molina v. Ramirez, Ariz., 138 Pac. 17.

51.——Tenants by Entirety.—A conveyance to husband and wife made them tenants by the entirety, so that the survivor would take the whole estate in the land.—McWhorter v. Green, Ark., 162 S. W. 1100.

52. **Indictment and Information**—Grand Jury.—The court will not inquire into proceedings before the grand jury to determine whether the evidence was sufficient to support the indictment, unless all the witnesses were incompetent, or all the testimony upon which the indictment was found incompetent.—People v. Duncan, Ill., 103 N. E. 1043.

53. **Injunction**—Moving Pictures.—A moving picture company, which uses the name and pictures of a person as a feature and not as incidental to the film, and not designed to instruct or educate, but only to amuse and to make money for the company, is using the portrait and name of the person for the "purpose of trade" within Civil Rights Law, §§ 50, 51.—Binns v. Vitagraph Co. of America, 103 N. E. 1108.

54.——Equity.—Whether a court of equity will enjoin actions at law to prevent multiplicity of suits is controlled by no fixed rule, but each case depends upon its own particular facts.—St. Louis Southwestern Ry. Co. of Texas v. Woldert Grocery Co., Tex., 162 S. W. 1174.

55. **Insurance**—Construction.—In case of doubt, an insurance policy will be construed in favor of the insured, and the positive undertaking by the company in one part of the policy will not be permitted to be negatived by a doubtful clause in another part.—Pacific Mut. Life Ins. Co. v. McCabe, Ky., 162 S. W. 1136.

56. **Limitation of Actions**—Nuisance.—Where a permanent obstruction causing regular overflow of plaintiff's land is erected, the right of action for all damages for the permanent nuisance then accrues, and the statute of limitations begins to run.—Perry v. Chicago, R. I. & G. Ry. Co., Tex., 162 S. W. 1185.

57. **Landlord and Tenant**—Tenancy Month to Month.—Where a lessor and lessee agree to abrogate lease and make new lease at a monthly rental, but lessee took possession without executing such new lease, the tenancy was from month to month.—Corner Market Co. v. Gillman, Wash., 138 Pac. 2.

58. **Malicious Prosecution**—Advice of Counsel.—For advice of counsel to constitute a good defense in an action for malicious prosecution, it is sufficient that defendant shall have fully and fairly disclosed to his counsel all the facts within his knowledge, and not necessary that he shall have disclosed all facts discoverable.—Roby v. Smith, Okla., 138 Pac. 141.

59. **Master and Servant**—Assumption of Risk.—Where the servant can see the danger, the fact that he is directed by the master's vice principal to do the work in a certain manner does not free him from the burden of assumed risk.—Pearlman v. Booth, 145 N. Y. Supp. 539.

60.——Automatic Couplers.—In an action for injuries to a trainman by failure of certain cars, which had been transported in interstate commerce, to couple automatically by impact, an instruction that plaintiff could not recover unless the jury believed that the cars had never been equipped with automatic couplers, or that the couplers had become out of repair so that they would not couple by impact, was proper.—Wheeling Terminal Ry. Co. v. Russell, U. S. D. C., 209 Fed. 795.

61.—Negligence.——A corporation operating an electric plant is presumed to know all the conditions known to an electrician, or is negligent in not knowing.—Myers v. Portland Ry., Light & Power Co., Ore., 138 Pac. 213.

62.——Respondeat Superior.—An employer is not liable for the negligence of his employe when not engaged in the line of the employment but pursuing purposes of his own.—Clark v. Wisconsin Cent. Ry. Co., Ill., 103 N. E. 1041.

63.——Safe Place.—That a miner was warned by his employer of the dangerous condition of

a roof which fell on him, and was directed to prop it, held not to relieve employer of liability, if it was not the miner's duty to prop it.—W. G. Duncan Coal Co. v. Thompson's Adm'r, Ky., 162 S. W. 1139.

64.——Warning.—Where a mining company employed a carpenter to repair a coal chute, down which coal was dumped while the carpenter was at work, it was the duty of the company to warn the carpenter before coal was dumped into the chute.—Maness v. Clinchfield Coal Corporation, Tenn., 162 S. W. 1105.

65.——Wrongful Discharge.—In an action for the wrongful discharge, where the contract was conditioned on the work being satisfactory to customers, evidence was admissible as to statements by the customers as to their dissatisfaction, where that was the ground of plaintiff's discharge.—Messmer v. Henry W. Boettger Silk Finishing Co., 145 N. Y. Supp. 560.

66. **Monopolies**—Labor Union.—Action of the members of a trade union in attempting to compel a manufacturer to unionize his factory, by leaving his employment and preventing others from accepting employment there, and boycotting his goods shipped into other states, held a conspiracy in violation of Sherman Anti-Trust Act, for which the manufacturer was entitled to recover treble damages under section 7.—Lawlor v. Loewe, C. C. A., 209 Fed. 721.

67. **Mortgages**—Pleading.—In foreclosure a grantee of the mortgagor under a warranty deed could not set up by cross petition damages against the mortgagor for breach of the covenants in the deed; such matter not being germane to the original action.—Tracey v. Crepin, Okla., 138 Pac. 142.

68. **Navigable Waters** — Navigation.—The paramount right of the federal government to fix harbor lines, etc., does not destroy the power of the state to regulate tide lands and waters in the interest of navigation, so long as such regulations do not interfere with those of the federal government made to promote commerce.—People v. California Fish Co., Cal., 138 Pac. 79.

69.——Patents to Land.—A patent to public lands abutting on a navigable stream, the channel of which is reserved to the state, does not give the riparian owner any rights to the bed.—State v. Macken, Tex., 162 S. W. 1160.

70. **Partnership**—Dissolution.—Where goods are consigned to a partnership for sale on a commission, the retirement of a partner and his notice to the consignor does not relieve him of his liability for those goods already delivered to the firm.—Julius Andrae & Sons Co. v. Peck, Mo., 162 S. W. 1059.

71.——Dissolution.—In a suit to dissolve a partnership, the venue is determined by the residence of parties, and not, by the locality of the firm assets, even when such assets include real estate; and hence the initial proceedings for the dissolution of a partnership and the appointment of a receiver should be had in the place of the partner's domicile.—Williams v. Williams, 145 N. Y. Supp. 564.

72. **Perjury**—Materiality.—It is unnecessary in an indictment for perjury to set forth the various circumstances which render the testimony material; general averments of materiality being sufficient.—Baskin v. United States, C. C. A., 209 Fed. 740.

73. **Partnership**—Relation of.—Persons, owning as heirs, devisees and legatees, a ferry franchise, a ferry boat and the ferry docks and the lands on which they are built, having suffered the ferry business, conducted by their ancestors and testators, to continue, each receiving his share of the profits from year to year, a partnership relation exists between them.—Bogardus v. Reed, 145 N. Y. Supp. 597.

74. **Payments** — Counterfeit Money.—Where counterfeit money is given in payment of a note, it does not satisfy the obligation.—Commercial Bank of Boonville v. Varnum, Mo., 162 S. W. 1080.

75.——Question of Law.—In an action on a promissory note, where the facts were not in dispute, the question whether the note was discharged by an alleged payment is one of law for the court.—Commercial Bank of Boonville v. Varnum, Mo., 162 S. W. 1080.

76. **Railroads**—Licensee.—The term "licensee," as applied to a common carrier, relates more properly to persons entering by express or implied permission on depot grounds or standing trains for purposes other than that of transportation.—Ingram v. Kansas City S. & G. Ry. Co., La., 64 So. 146.

77.——Trespasser.—Where, according to a general custom, newsboys are permitted to go on street railway cars to sell and deliver papers, a boy is not a trespasser while on a car selling a paper, unless his rights on the car have been terminated by reasonable notice.—Ingram v. Kansas City S. & G. Ry. Co., La., 64 So. 146.

78. **Sales**—Construction of Contract.—Whether an agreement, under which one party obtains possession from another of a chattel, and in which the latter seeks to reserve some kind of title, shall be construed as a lease, conditional sale, or mortgage depends on its effect and not what it is designated by the parties.—Corbett v. Riddle, C. C. A., 209 Fed. 811.

79. **Set-Off and Counterclaim**—Equity.—A counterclaim in an equity suit must be one on which suit might be maintained by the defendant against the plaintiff.—Templeton v. Cook, Ore., 138 Pac. 230.

80. **Trusts**—Fraud.—Where one obtained land by fraud, and a defendant negotiated with third parties an exchange for other land of which he afterwards received a deed, a constructive trust was properly impressed on the land so obtained.—Clough v. Dawson, Ore., 138 Pac. 233.

81. **Vendor and Purchaser**—Lien.—Although a number of deeds in a chain of title were not recorded, nevertheless onee claiming title through such unrecorded deeds is chargeable in law with notice of a vendor's lien shown in them.—Thompson v. Keys, Tex., 162 S. W. 1196.

82.——Rescission.—A purchaser's waiver of its rights to rescind an executory contract after knowledge of fraud in its execution, by continuing in possession and expending money thereon, constituted a ratification of the contract.—Gordon-Tiger Mining & Reduction Co. v. Brown, Colo., 138 Pac. 51.

83.——Unincumbered Title.—A contract to convey in fee is not satisfied by a conveyance subject to mortgage.—Wentworth v. Manhattan Market Co., Mass., 103 N. E. 1105.

84. **Waters and Water Courses**—Irrigation Districts.—Irrigation districts are public corporations.—McCord Mercantile Co. v. McIntyre, Colo., 138 Pac. 59.

85.——Public Carrier.—An irrigation canal company carrying water for hire is a quasi public carrier, being an intermediate agency for aiding consumers in the exercise of their right to appropriate water, as well as a private enterprise operated for profit.—City and County of Denver v. Brown, Colo., 138 Pac. 44.

86. **Wills**—Estoppel.—Where a husband with his wife's knowledge devised land in which she had an estate by the entirety to her son in consideration of the latter supporting her for life, and she lived with the son until her death without claiming any interest in the land, held that she elected to affirm the will so as to estop one from claiming the property as her heir.—McWhorter v. Green Ark., 162 S. W. 1100.

87.——Intent.—Rules of construction relating to the time of vesting remainders, presumptions of entire testacy, and clauses clearly giving interests, being affected by subsequent clauses, all yield to the intent of the testator when it may be ascertained from the entire will itself.—Citizens' Loan & Trust Co. v. Herron, Ind., 103 N. E. 1092.

88.——Remainderman.—The power to consume the corpus given to a life tenant does not defeat a remainder over, and such of the property as is left at the expiration of the life interest or estate goes to the remainderman.—In re Kingsley, 145 N. Y. Supp. 662.

89.——Undue Influence.—To vitiate a will, influence must have had the effect of overcoming testator's free agency at the time the will was made, so as to induce him to dispose of his property differently from the disposition he would have made had he followed his own inclination.—In re Hodgdon's Estate, Cal., 138 Pac. 111.